Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–1 OF 2002(P)

AHMAD FAIRUZ CJ (MALAYA), HAIDAR AND MOHTAR ABDULLAH FCJJ

20 SEPTEMBER 2002

Civil Procedure *— Contempt of Court — Administration of justice — Appellant disposed off subject matter of a pending proceeding for Mareva injunction — Whether appellant free to dispose off its assets until the moment when the Mareva injunction is granted against it — Whether appellant's conduct interfered with the due administration of justice or the course of justice — Whether the appellant be found to have been guilty of being in contempt of court by interfering with the due administration of justice for its conduct in disposing off its assets*

The issue before the court was in relation to a contempt of court not for breach of a particular order of court but for conduct of interfering with the due administration of justice or the course of justice by disposing the subject matter of a pending proceeding for Mareva injunction. The learned High Court judge found on the facts that no contempt of court was committed and hence, dismissed the application. The Court of Appeal found otherwise on the facts and ruled there was contempt of court and set aside the order of the learned judge. The Federal Court was concerned with two questions: (i) whether the appellant against whom an application for a Mareva injunction is pending in court, free to dispose off its assets until the moment when the Mareva injunction is granted against it; and (ii) if the answer to the first question is in the affirmative, then, whether the appellant can be found to have been guilty of being in contempt of court by interfering with the due administration of justice for his conduct in disposing off his assets, in all the circumstances of this case.

Held, dismissing the appeal:

(1) '[E]ven where there is no injunction to make explicit the importance of preserving the subject matter of an action until trial, a wanton destruction of that subject matter, with the intention of impeding a fair and fruitful trial, is capable of being a contempt of court ...' — per Lord Mustill in *Harrow London Borough Council v Johnstone*. Thus, the court's answer to the first question, ie whether the appellant against whom an application for a Mareva injunction is pending in court, free to dispose off its assets until the moment when the Mareva injunction is granted against it, would be in the affirmative, subject to the qualification that there was no wanton destruction of the subject matter with the intention of impeding a pending proceeding for Mareva injunction. It was the interests of justice that the court had to determine. It all depended on the circumstances of the particular case (see p 249B–E); *Harrow London Borough Council v Johnstone*

[1997] 1 WLR 459 and *Re Septimus Parsonage & Co* [1901] 2 Ch 424 followed.

(2) What needed to be considered was not so much of no injunction order having been made and therefore the appellant was at liberty to dispose off its assets, but more towards its conduct in disposing off its assets with its eyes open to the pending Mareva injunction proceeding. On the facts, the speed with which the assets were disposed off and for that matter to parties that are closely related to the persons in control of the appellant were not seriously disputed. At the time when the Mareva injunction was granted, the appellant chose to remain silent and let the order be made knowing fully well that it would be a futile order and it would come to naught. On the particular facts and circumstances of the case, the court found that the intention of the appellant clearly was to interfere with due administration of justice or in the course of justice (see pp 251I–252C, D–E).

(3) In the absence of a specific legislation on the contempt of court, the contempt of court in our country is guided by the common law principles. In this case, the standard of proof required is proof beyond reasonable doubt. Though the Court of Appeal stated that mens rea of the contemnors need not be proved, it proceeded to consider mens rea as well. After considering the acts of the defendant and the circumstances in which they were carried out from which the contemnors could not disassociate themselves, the Court of Appeal ruled that the intention was too clear. There was no ground to disagree with the finding of facts by the Court of Appeal on the issue of contempt of court against the contemnors. On the particular facts and circumstances of this case, the court would answer question (2) in the affirmative (see pp 253F–254B); *Houng Hai Hong & Anor v MBf Holdings Bhd & Anor & 3 other appeals* [1995] 4 CLJ 427, *Re AG's Application, AG v Butterworth* [1963] 1 QB 696 and *TO Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151 followed.

[Bahasa Malaysia summary

Persoalan di hadapan mahkamah adalah berkaitan satu penghinaan mahkamah yang bukan berkaitan dengan perlanggaran satu perintah mahkamah tertentu, tetapi kerana perbuatan campur tangan dengan pentadbiran keadilan atau perlaksanaan keadilan sewajarnya dengan melupuskan perkara pokok satu prosiding sementara menunggu injunksi Mareva. Hakim Mahkamah Tinggi yang bijaksana memutuskan berdasarkan fakta-fakta bahawa tiada penghinaan mahkamah telah berlaku dan justeru itu menolak permohonan tersebut. Mahkamah Rayuan telah memutuskan sebaliknya berdasarkan fakta-fakta dan memutuskan terdapat penghinaan mahkamah dan mengenepikan perintah hakim bijaksana tersebut. Mahkamah Persekutuan perlu mempertimbangkan dua persoalan:

A (i) sama ada perayu, yang mana satu permohonan untuk satu injunksi Mareva masih tertangguh di mahkamah, bebas untuk melupuskan aset-asetnya sehingga saat apabila injunksi Mareva tersebut diberikan terhadapnya; dan (ii) sekiranya jawapan kepada persoalan pertama adalah bersifat positif, maka, sama ada perayu boleh didapati bersalah kerana menghina mahkamah kerana campur tangan dalam
B pentadbiran keadilan sewajarnya ke atas perbuatan beliau melupuskan aset-asetnya, dalam keadaan kes ini.

Diputuskan, menolak rayuan tersebut:

C (1) '[E]ven where there is no injunction to make explicit the importance of preserving the subject matter of an action until trial, a wanton destruction of that subject matter, with the intention of impeding a fair and fruitful trial, is capable of being a contempt of court ...' — oleh Lord Mustill dalam *Harrow London Borough Council v Johnstone.* Oleh itu, jawapan mahkamah
D terhadap persoalan pertama tersebut, iaitu sama ada perayu, yang mana satu permohonan untuk satu injunksi Mareva masih tertangguh di mahkamah, bebas untuk melupuskan aset-asetnya sehingga injunksi Mareva tersebut diberikan terhadapnya, adalah bersifat positif, tertakluk kepada kelayakan bahawa tiada perbuatan yang memusnahkan perkara pokok dilakukan dengan
E niat untuk menghalang satu prosiding sementara menunggu injunksi Mareva. Mahkamah perlu menentukan untuk kepentingan keadilan. Semuanya bergantung kepada keadaan kes tertentu (lihat ms 249B–E); *Harrow London Borough Council v Johnstone* [1997] 1 WLR 459 dan *Re Septimus Parsonage & Co* [1901] 2 Ch 424 diikut.

F (2) Apa yang perlu dipertimbangkan bukanlah ke atas fakta bahawa tiada injunksi telah dibuat dan oleh itu perayu bebas untuk melupuskan aset-asetnya, tetapi lebih kepada perbuatannya melupuskan aset-asetnya walaupun mengetahui bahawa terdapat prosiding injunksi Mareva yang tertangguh. Berdasarkan fakta-
G fakta, bagaimana aset-aset tersebut telah dilupuskan dengan begitu cepat dan dijual kepada pihak-pihak yang mempunyai hubungan yang begitu rapat dengan orang berkaitan dengan perayu tidak dipertikaikan dengan serius. Pada masa injunksi Mareva dibenarkan, perayu memilih untuk berdiam diri dan
H membiarkan perintah tersebut dibuat dengan mengetahui sepenuhnya bahawa ia adalah satu perintah yang sia-sia dan akan menjadi sia-sia sahaja. Berdasarkan fakta-fakta dan keadaan-keadaan dalam kes ini, mahkamah mendapati bahawa niat perayu adalah jelas untuk campur tangan dalam pentadbiran keadilan atau dalam perlaksanaan keadilan yang sewajarnya (lihat
I ms 251I–252C, D–E).

(3) Dengan ketiadaan satu perundangan yang khusus berhubung penghinaan mahkamah, penghinaan mahkamah dalam negara ini

dikawal oleh prinsip-prinsip 'common law'. Dalam kes ini, standard bukti yang diperlukan adalah bukti melampaui keraguan munasabah. Walaupun Mahkamah Rayuan menyatakan bahawa mens rea orang-orang yang menghina mahkamah tidak perlu dibuktikan, ia masih juga mempertimbangkan mens rea. Setelah mempertimbangkan tindakan-tindakan perayu dan keadaan-keadaan di mana ia dilaksanakan yang mana orang-orang yang menghina mahkamah tidak boleh mengelak daripada mengaitkan diri mereka, Mahkamah Rayuan memutuskan bahawa niat tersebut amat jelas. Tiada alasan untuk tidak bersetuju dengan penemuan fakta-fakta oleh Mahkamah Rayuan berdasarkan persoalan penghinaan mahkamah terhadap orang-orang yang menghina mahkamah. Berdasarkan fakta-fakta dan keadaan-keadaan khusus tersebut, mahkamah akan menjawab soalan (2) dengan positif (lihat ms 253F–254B); *Houng Hai Hong & Anor v MBf Holdings Bhd & Anor & 3 other appeals* [1995] 4 CLJ 427, *Re AG's Application, AG v Butterworth* [1963] 1 QB 696 dan *TO Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151 diikut.]

A B C D

Notes

For cases on administration of justice, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 1423.

E

Cases referred to

AG's Application, Re, AG v Butterworth [1963] 1 QB 696 (refd)
Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors [1986] 2 MLJ 193 (refd)
Attorney-General v Hislop & Anor [1991] 1 All ER 911 (refd)
Attorney-General v Newspaper Publishing Plc [1987] 3 All ER 276 (refd)
Attorney-General v Times Newspaper Ltd [1992] 1 AC 191 (refd)
Chandra Sri Ram v Murray Hiebert [1997] 3 MLJ 240 (folld)
Harrow London Borough Council v Johnstone [1997] 1 WLR 459 (folld)
Houng Hai Hong & Anor v MBf Holdings Bhd & Anor & 3 other appeals [1995] 4 CLJ 427 (folld)
Ismail v Polish Ocean Lines [1976] 1 All ER 902; [1976] QB 893 (refd)
Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637 (refd)
Menteri Sumber Manusia, Peninsular Malaysia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337 (refd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151 (refd)
Septimus Parsonage & Co, Re [1901] 2 Ch 424 (folld)
TO Thomas v Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151 (refd)

F G H

Legislation referred to

I

Arbitration Act 1952 s 13(6)(f), (h)
Courts of Judicature Act 1964 ss 13, 78, 96(a)

A Federal Constitution art 126
Federal Court Rules 1995 rr 47(4), 57(1), (2)
Rules of the High Court 1980 O 25 r 2(2)

Appeal from: Civil Appeal No P–02–638 of 2000 (Court of Appeal, B Kuala Lumpur)

V Sithambaram (*P Navaratnam* and *S Parameswaran* with him) (*Sitham & Assoc*) for the appellant.

Karin Lim Ai Ching (*Lim Hok Siang* and *Lim Chong Fong* with him) (*Presgrave & Matthews*) for the respondent.

C **Haidar FCJ** (delivering judgment of the court): The issue before this court is in relation to a contempt of court not for breach of a particular order of court but for conduct of interfering with the due administration of justice or the course of justice by disposing the subject matter of a pending proceeding for Mareva injunction.

D The learned judge found on the facts that no contempt of court was committed and hence dismissed the application. The Court of Appeal found otherwise on the facts and ruled there was contempt of court and set aside the order of the learned judge. It remitted the case to the High Court for sentence. At first blush, it would appear to be essentially a question of facts in which leave should not have been granted in this appeal as s 96(a) E of the Courts of Judicature Act 1964 has not been satisfied. That in fact was the stand taken by counsel for Jasa Keramat Sdn Bhd in opposing the leave application of Monatech (M) Sdn Bhd to this court.

We will first consider whether that is the correct position.

In this judgment, we will refer the parties according to their positions in F the High Court, that is, the appellant as 'the defendant' and the respondent as 'the plaintiff and the three persons, namely the appellant's directors, Khor Kok Boon and Mohd Dzolkefli bin Jaafar Sedik, and the appellant's general manager, Khor Kok Thye as the 'contemnors'.

When this court granted leave to appeal to the defendant on 8 January G 2002, the question framed at p 11 of the appeal record, Vol 1 reads:

> Whether a defendant against whom an application for a Mareva injunction is pending in court, is free to dispose off his assets until the moment, when the Mareva injunction is granted against him.

In the course of hearing the appeal, we pointed out to counsel for the H defendant that we do not think the question as framed permits of any answer other than 'It all depends', which is not very helpful. However, all concerned know that the real issue is whether in the circumstances of this case, the contemnors could be guilty of contempt of court and the question can, if necessary, be rephrased to raise that issue (see *Attorney-General v Newspaper Publishing Plc* [1987] 3 All ER 276 at p 290 and *Ismail v Polish* I *Ocean Lines* [1976] 1 All ER 902, [1976] QB 893).

Counsel for the defendant attempted to seek leave of this court to amend the motion viva voce. Counsel for the plaintiff objected. We ordered

the defendant to file a motion to seek leave of this court to amend or rephrase the original question.

Solicitors for the defendant accordingly filed a motion on 30 April 2002 to seek leave of this court to put in a consequential question framed as question (2). A copy of the motion was served on the solicitors for the plaintiff. The motion is supported by the affidavit of Mr Sithambaram, counsel for the defendant, together with, inter alia, a copy of the original motion filed earlier on (marked as exh 'VS-1') and the memorandum of appeal (marked as exh 'VS-4').

The plaintiff's counsel put in an outline submission objecting to the defendant's motion.

After hearing counsel for both parties, we allowed the motion and ordered costs to follow the event of the appeal.

We allowed the motion by virtue of the discretionary power vested in this court under r 57(2) of the Federal Court Rules 1995 which provides the important concession to the appellant (defendant) by providing that 'the appellant shall not at the hearing without leave of the court put forward any other ground of objection ...'. This court had the occasion to consider r 57(2) read with rr 47(4) and 57(1) in *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337 (distinguishing the Federal Court case of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151) wherein Edgar Joseph Jr FCJ, speaking for the court said at p 352:

> Clearly, therefore, having regard to these provisions, the Federal Court has the *power* and therefore the *discretion* to permit an appellant to argue a ground which falls outside the scope of the questions regarding which leave to appeal had been granted in order to avoid a miscarriage of justice. These are matters which *Sababumi* does not appear to have addressed — perhaps, because they were not raised in argument — and so, the focus of the decision lay elsewhere, more particularly, having decided the question of power against the appellant, understandably, it did not address the issue of *discretion*. (Emphasis added.)

If leave is not granted, the answer to the original question as framed would, in our view, be rendered merely academic and as stated earlier, it permits of any answer other than 'It all depends'. Hence, the need for the consequential question put forth by the defendant in order for this court to determine the appeal of the defendant.

In any event, the plaintiff cannot argue that it is prejudiced by us allowing for the second question to be put in by the defendant as the facts for determination of the said question are sufficiently within the plaintiff's knowledge as evidenced from exhs 'VS-1' and VS-4'.

That put to rest the objection of the plaintiff. We now proceed to consider the questions:

(1) whether the defendant against whom an application for a Mareva injunction is pending in court is free to dispose off his assets until the moment when the Mareva injunction is granted against him; and

(2) if the answer to the said question is in the affirmative, then, can the appellant/defendant in this appeal be found to have been guilty of being in contempt of court by interfering with the due administration of justice for his conduct in disposing off his assets, in all the circumstances of this case?

Question (1)

It seems there has been no decision by this court, as the apex court of this country, on contempt of court other than in matters pertaining to a breach of a court order or contempt committed in the face of the court, and particularly in this case, regarding disposal of assets by a defendant when there is an application pending for a Mareva injunction before the court.

This fact has been acknowledged by the Court of Appeal at pp 58–59 of the appeal record:

> Lastly, we would like to say that we are aware of the far-reaching consequences of this decision as this is perhaps the first time in this country that the court finds a person guilty of contempt not for breach of a particular order but for conduct of interfering with the due administration of justice or the course of justice, by disposing the subject matter of a pending proceeding under questionable circumstance to questionable people to frustrate the outcome of the proceedings and the execution thereof. This judgment must not be understood to mean that whenever there is a pending proceeding, any disposal of the subject matter of the proceedings or the assets of one of the parties thereto is contempt. No, far from it. Whether an act amounts to an interference with the due administration of justice or the course of justice and therefore contempt, or not, depends on the circumstances of each case.

The Court of Appeal in finding on the facts of the case that there was commission of contempt of court relied on what Llyod LJ in *Attorney-General v Newspaper Publishing Plc*, inter alia, said at p 378:

> The act must be sufficiently serious and sufficiently closely connected with the particular proceedings.

This is premised on the fact that not all acts which are calculated to interfere with the administration of justice or the course of justice will necessarily ground a charge of contempt.

It is clear that the power to punish for contempt of court is provided in art 126 of the Federal Constitution:

> The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

There is a similar provision repeated in s 13 of the Courts of Judicature Act 1964.

There is no specific legislation on contempt of court in this country.

By virtue of the above statutory provisions, it is correct, in our view, for the Court of Appeal to state:

> It is the common law principles that the courts of this country have been applying.

Following the principle, *Oswald's Contempt of Court* (3rd Ed) provides a good guide to a general definition of contempt of court, thus:

> To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties, litigants or their witnesses during litigation.

What therefore is contempt of court, 'is interference with the due administration of justice' — per Nicholls LJ at p 923 of *Attorney-General v Hislop & Anor* [1991] 1 All ER 911 (CA).

In view of the generality of the phrase 'interference with the due administration of justice', we are of the view that the categories of contempt are never closed. To that extent we respectfully endorse the statement made by Low Hop Bing J, in *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240 at p 270:

> The circumstances and categories of facts which may arise and which may constitute contempt of court, in a particular case, are never closed. This is the same position as in the case of negligence in which the scope for development is limitless. Contempt of court may arise from any act or form whatsoever, ranging from libel or slander emanating from any contemptuous utterance, news item, report or article, to an act of disobedience to a court order or a failure to comply with a procedural requirement established by law. Any of these acts, in varying degrees, affects the administration of justice or may impede the fair trial of sub judice matters, civil or criminal, for the time being pending in any court.
>
> The particular matrix of the individual case is of paramount importance in determining whether a particular circumstance attracts the application of the law of contempt. Hence, a positive perception of the facts is a prerequisite in deciding whether or not there is any contravention necessitating the invocation of the law of contempt.

In respect of question (1), Mr Sithambaram, counsel for the defendant, submitted on the narrow ground that since there was no order made for a Mareva injunction and neither was an interim order applied for and made by the court, the defendant was at liberty to sell the properties and the alleged contemnors could not have had any mens rea for what they did. It was contended that what the Court of Appeal did was an unwarranted extension of the law and therefore unjust.

In this respect, we need to consider two cases (also considered by the Court of Appeal). They are *Harrow London Borough Council v Johnstone* [1997] 1 WLR 459 (HL(E)), and *Re Septimus Parsonage & Co* [1901] 2 Ch 424.

We fully subscribe to what Lord Mustill said in *Harrow* referring to a passage in the judgment of Lord Oliver of Aylmerton in *Attorney-General v Times Newspaper Ltd* [1992] 1 AC 191. This is what his Lordship said at p 469:

> It is not perhaps entirely clear what the reasoning of the House would have been if *the injunction had not existed at all.* A lead towards the answer is, I believe, given by Lord Oliver of Aylmerton, at p 224:

> 'If the court has taken into its hands the conduct of the matter to the extent of ordering the interim preservation in the interest of the plaintiff so that the issue between him and the defendant can be properly and fairly tried, it has to be accepted that that is what the court had determined that the interests of justice require. The gratuitous intervention of a third party intended to result in that purpose being frustrated and the outcome of the trial prejudiced, must manifestly interfere with and obstruct what the court has determined to be the interests of justice. *Those interests are not dependent upon the scope of the order.*'
>
> This reasoning shows, I believe, that *even where there is no injunction to make explicit the importance of preserving the subject matter of an action until trial a wanton destruction of that subject matter, with the intention of impeding a fair and fruitful trial, is capable of being a contempt of court*; and indeed I would myself have been willing to recognize this possibility even without the guidance of the House. (Emphasis added.)

In *Re Septimus Parsonage & Co*, it was held at p 424 that:

> When a petition is pending for the winding up of a company, it is a contempt of court to issue a circular to shareholders of the company containing misrepresentations with the intent to obtain a resolution of the company for the voluntary winding up thereof, and thereby mislead the court as to the real view of the shareholders and prevent a compulsory winding up order from being made.

Our answer to the first question would be in the affirmative subject to the qualification that there is no wanton destruction of the subject matter with the intention of impeding a pending proceeding for Mareva injunction. It is the interests of justice that the court has to determine. It all depends on the circumstances of the particular case. The statement of law by the Court of Appeal in its judgment and set out in the earlier part of this judgment is a correct one. We cannot therefore accept the contention of Mr Sithambaram that what the Court of Appeal did was an unwarranted extension of the law and therefore unjust.

Question (2)

The answer to question (2) is essentially centred on the finding of facts by the courts below.

The facts of the case have been narrated in detail by the Court of Appeal and we do not propose to repeat them here. We will set out the salient facts.

Arising out of disputes pertaining to a building contract executed by the parties, pursuant to an arbitration clause thereof, the plaintiff commenced arbitration proceeding against the defendant sometime in 1997.

On 1 June 1998, the plaintiff filed OS 509/98 pursuant to s 13(6)(f) and (h) of the Arbitration Act 1952 to secure some of the plaintiff's claim up to the value of RM2.5m pending the award of the arbitrator. On the same date, the plaintiff filed summons in chambers ex parte for a Mareva injunction against the defendant, inter alia, to restrain the defendant from disposing off its assets.

On 7 July 1998, the defendant filed OS 24–670–1998 (MT-3) seeking removal of the arbitrator on the ground of alleged bias and obtained an ex parte injunction restraining the arbitrator. A

On 20 July 1998, the parties recorded a consent order wherein the defendant agreed to deposit the sum of RM575,000 (being the retention sum) into a joint stakeholder account held by the solicitors for the respective parties pending the determination of the said arbitration. B

We now need to examine the ex parte application of the plaintiff filed on 1 June 1998 for Mareva injunction that eventually resulted in the contempt of court proceeding against the contemnors. According to counsel for the plaintiff, the learned judge at the material time, Jeffrey Tan J, ordered the ex parte application be heard inter partes. From the ex parte application enclosed to the submission of counsel for the plaintiff, we observe that it was fixed initially for hearing on 30 June 1998. Again, according to the counsel for the plaintiff, the matter was adjourned a number of times (the reasons of which we do not know or have the benefit of) until 14 August 1998 when the defendant through its solicitors pledged eight units of properties as security and the matter was adjourned to 29 August 1998. It seemed that the plaintiff did not accept the pledge on the ground that it was insufficient. C D

After the inter partes application of the plaintiff was adjourned for hearing to 29 August 1998, the defendant started to take certain steps which in reality may amount to impeding or frustrating an order that may be made at the inter partes hearing of the Mareva injunction fixed on 29 August 1998. At that point of time, the defendant was aware of the prayer of the plaintiff for a Mareva injunction order. E

While OS 509 and OS 670 were still pending in the High Court, Pulau Pinang, the defendant on 17 August 1998 took the unusual step of filing Civil Suit No 22–1075–98 at Shah Alam High Court ('the Shah Alam suit') against the plaintiff. The defendant, as plaintiff, in the Shah Alam suit was represented by another firm of solicitors, Messrs Mahadevi Nadchatiram & Partners. It is from this point onwards that the trouble started wherein the defendant more or less put its directors and general manager ('the contemnors') in jeopardy of contempt of court. F G

In the Shah Alam suit, the defendant's claims were identical to the defendant's counterclaim in the arbitration proceeding. On 27 August 1998 itself, the defendant obtained an ex parte injunction order from the learned judge at Shah Alam High Court to restrain OS 509 and OS 670 and the arbitration proceeding and also an order directing RM575,000 held in stakeholders' account pursuant to the consent order be forthwith paid out to the defendant upon service of the ex parte order. The plaintiff, as defendant, in the Shah Alam suit took out two summonses to have the Shah Alam suit struck out as an abuse of the process of court. The applications were heard and dismissed by the learned judge and hence, the appeal by the plaintiff to the Court of Appeal which allowed the appeal and struck out the Shah Alam suit as it smacked of an abuse of the process of court and the learned judge was held to have erred in the exercise of his discretion (see *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637). H I

A It would not perhaps be out of order for us to quote the observation of the Court of Appeal in respect of the Shah Alam suit about the summons itself at p 645:

> The respondent's (defendant) application was not marked as an ex parte summons. In fact it was, on its face, made returnable inter partes before the
B judge in chambers on 4 September 1998. However, for some inexplicable reason, it was heard ex parte on 27 August 1998.

The date, 27 August 1998 is the date that the writ was issued. We quote the observation of the Court of Appeal merely to show the conduct of the defendant, that is, the haste or speed with which the order was obtained and then served it on the plaintiff on the next day, 28 August 1998. It is our
C observation that the purpose of serving the order on 28 August 1998 on the Pulau Pinang High Court judge, Jeffrey Tan J, personally could not be for any other reason than to stall the continued hearing of the inter partes application of the plaintiff fixed on 29 August 1998. The object must inevitably be to defeat the plaintiff's application for an order to injunct the
D sale or otherwise of the defendant's assets. Not only that, the defendant managed to obtain an order from the High Court in Shah Alam to set aside a consent order (in which the defendant is a party) recorded before the High Court in Pulau Pinang! It is no wonder then for Gopal Sri Ram JCA, speaking for the Court of Appeal in respect of the Shah Alam suit to comment at p 647, thus:

E

> What remains is to apply the relevant principles to the facts of the present appeal. When that is done, I am driven to the conclusion that the respondent plainly abused the process of the court not only in instituting the third action but in the steps it took therein.

On 12 May 1999, the defendant's application to the Federal Court for a stay
F of proceedings in respect of the Shah Alam suit pending their appeal to the Federal Court was dismissed.

We accept that when the plaintiff succeeded in obtaining a Mareva injunction order on 24 August 1999, all the units had been sold by May 1999 as can be seen at pp 491–493 of the appeal record. The sales were
G made even before the caution by the learned judge in June 1999. But we must not forget that the application for Mareva injunction was filed as early as 1 June 1998 and it was stalled for almost a year by the unusual steps taken by the defendant in filing the Shah Alam suit against the plaintiff and obtaining an ex parte injunction order against the Pulau Pinang High Court proceeding. The defendant was fully aware of the prayer for Mareva
H injunction by the plaintiff in the Pulau Pinang High Court. After the Shah Alam suit was struck out by the Court of Appeal on 3 May 1999, the Mareva injunction proceeding continued for hearing in June, July and August and only on 24 August 1999 did the High Court Pulau Pinang granted the Mareva injunction order against the defendant. By the time when the Mareva injunction order was obtained on 24 August 1999, there
I was nothing to injunct. In other words, it is only a paper order and of no value whatsoever. What needs to be considered is not so much of no injunction order having been made and therefore the defendant is at liberty

to dispose off its assets but more towards its conduct in disposing off its assets with its eyes open to the pending Mareva injunction proceeding. A

We do not propose to set out in detail the disposal of the assets of the defendant as they are sufficiently set out by the Court of Appeal. Suffice for us to say that the speed with which the assets were disposed off and for that matter to the parties that are closely related to the persons in control of the defendant are not seriously disputed. It was not seriously challenged that the sales were made not at arms length. In some of the sales, the transfers were executed even without the full payments! Surprisingly, at the time when the Mareva injunction was granted, the defendant chose to remain silent and let the order be made knowing fully well that it would be a futile order and it would come to naught. The reason given for the silence was that the counsel had no knowledge of the disposal of all the assets by the defendant. Is that a good reason? We must say that it is the duty of counsel to get instructions from the defendant on the disposal of its assets so that counsel can then inform the court accordingly in the event the court is minded to grant a Mareva injunction order. It was only on 17 November 1999 that the defendant informed the plaintiff that there were no units left that led to the plaintiff subsequently taking steps towards contempt of court proceeding against the contemnors. B C D

On the particular facts and circumstances of this case, we agree with the finding of the Court of Appeal in concluding that the intention of the defendant clearly is to interfere with due administration of justice or in the course of justice at p 36 of its judgment: E

> In any event, looking at all the facts of the respondent (defendant) company and the circumstances under which they were carried out from which the contemnors cannot disassociate themselves, the intention is too clear. It is no other than to dissipate all the assets of the respondent (defendant) company in questionable dealings to frustrate the Mareva injunction proceedings then pending and any judgment that might be obtained later by the appellant (plaintiff) in the arbitration proceeding. Thus, their intention clearly is to interfere with the due administration of justice or in the course of justice. F

We have examined the judgment of the learned judge and we are of the view that there was lack of positive perception of the facts of this case by him when he held that there was no contempt of court committed by the contemnors. He was more focused on there being no Mareva injunction order or for that matter no interim order and therefore the defendant is at liberty to dispose off its assets. G

On the issue of double jeopardy, we see no merits in this claim as clearly on the facts, the contempt of court referred to was in respect of obtaining an injunction order from the Shah Alam Court by the defendant restraining the Pulau Pinang High Court proceedings. It was based on the letter dated 27 August 1998 addressed to the learned judge direct enclosing a copy of the injunction order of the Shah Alam Court for the learned judge to comply therewith. The present proceeding against the contemnors is for contempt of court for disposing off the assets in questionable dealings by the defendant knowing of the pending Mareva injunction proceeding against it. H I

The defendant tries to impede or defeat the pending Mareva injunction proceeding and the Court of Appeal correctly, in our view, find their acts to be interference with the administration of justice or course of justice.

In that respect, we agree with the Court of Appeal when it said:

> ... it is on that narrow ground and on those specific acts that the first contempt proceeding was initiated.

On the issue of the statement pursuant to O 25 r 2(2) of the Rules of the High Court 1980 on the insufficiency of the charge, we note that it was argued for the first time before the Court of Appeal but nevertheless it was considered by the Court of Appeal. This issue has been dealt with by the Court of Appeal. After setting out briefly the statement filed by the plaintiff, the Court of Appeal stated at p 33:

> They never denied that they were involved in the acts complained of nor did they ever deny that they knew of the acts complained of. In fact, all three of them, through Khor Kok Thye filed affidavit and set out their defence which clearly shows that they knew the facts of the contempt alleged against them.

In support of its finding, the Court of Appeal referred to what Azmi SCJ (as he then was) said in the Supreme Court case of *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193 at p 196:

> Lastly, as regards the complaint that the charge in the statement is defective in that it lacks particulars, we note that the alleged contempt in the statement is in the writing of the four letters by the advocate himself to the appellate judges either directly or copied to them and others. Having regard to the contents of the letters which are referred to in the statement and exhibited in the verifying affidavit, we find it is sufficient for the advocate to know what the alleged contempt is against him, and to enable him to meet the charge and prepare his defence.

We agree and need say no more.

In the absence of a specific legislation on the contempt of court as stated earlier by us, the contempt of court in our country is guided by the common law principles. We agree with what was stated by Sir John Donaldson MR in *Attorney-General v Newspapers Publishing Plc*, that the standard of proof is the criminal standard, be it classified as 'civil contempt' or 'criminal contempt' though such classification may tend to mislead rather than to assist. Be that as it may, we are here concerned with the conduct involving an interference with the due administration of justice or the course of justice and not conduct involving a breach or assisting in the breach of a court order. In this case, the standard of proof required is proof beyond reasonable doubt. This standard of proof had been approved by our Supreme Court in *Houng Hai Hong & Anor v MBf Holdings Bhd & Anor & 3 other appeals* [1995] 4 CLJ 427.

Though the Court of Appeal stated that mens rea of the contemnors need not be proved by citing *Re AG's Application, AG v Butterworth* [1963] 1 QB 696 and the Federal Court case of *TO Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151 in support thereof, it proceeded to consider mens rea as well. After considering the acts of the defendant and the

circumstances in which they were carried out from which the contemnors cannot disassociate themselves, the Court of Appeal ruled that the intention is too clear. The Court of Appeal proceeded to state thereafter:

> It is no other than to dissipate all the assets of the respondent (defendant) company in questionable dealings to frustrate the Mareva injunction proceedings then pending and any judgment that might be obtained later by the appellant (plaintiff) in the arbitration proceeding.

We do not see any ground to disagree with the finding of facts by the Court of Appeal on the issue of contempt of court against the contemnors.

On the particular facts and circumstances of this case, we would answer question (2) in the affirmative.

In the circumstances, we dismiss this appeal with costs and affirm the order of the Court of Appeal. Deposit to go towards account of taxed costs.

My learned Chief Judge of Malaya has seen the judgment and agreed with it.

As the remaining judge, Mohtar Abdullah FCJ, is unable to exercise his functions due to illness, this judgment is given pursuant to s 78 of the Courts of Judicature Act 1964.

Appeal dismissed.

Reported by Peter Ling